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91-368

Supreme Court U.S.
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NO.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN THE MATTER OF THE ESTATE OF
LAURENCE T. BROWN, a Minor.

SHARON M. BROWN,

Petitioner,

vs.

GENE BROWN AND GLENDA BROWN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF THE STATE OF
ILLINOIS, FOURTH JUDICIAL DISTRICT

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(1a) QUESTIONS PRESENTED

1. Whether the Illinois statute, Chap. 110 1/2, par. 11-7, Ill.Rev.Stat., under which petitioner's child has been ordered placed in the custody of respondents (petitioner's father and his new wife), is unconstitutional, for any or all of the following reasons:

A. On its face, is the statute unconstitutional, in violation of due process of law and/or equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution, because it authorizes a court to deprive a parent of custody of his or her child (on the basis of "best interest" of the child), even if the parent is "fit," only where both parents are living and not living together, while if the parents live together, or if one parent is dead, a parent cannot be deprived of custody unless the parent is "unfit"?

B. As (mis)construed and (mis)applied by the Appellate Court, is the statute unconstitutional as depriving petitioner of a liberty interest protected by the due process clause of the Fourteenth Amendment, in that it deprives petitioner of parental rights--that is, the mother's fundamental, constitutional right to the custody and care of her child --absent a finding that she is an unfit parent,¹ and absent any showing of any compelling State interest justifying interference with such fundamental right? It permits a mother, who is a fit parent, to have her child taken from her to be raised by her father and step-mother, because the mother is a practicing lesbian and because her father is economically more secure.

1. The trial court (Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois) expressly declined to find that petitioner was "unfit," but, rather, recognized that "the issue in this case is not whether Sharon (petitioner) is unfit." (App. 25-26)

2. Whether the Appellate Court's affirmance improperly is based upon a strained misreading of the statute in order to avoid squarely ruling on the federal constitutional issues just delineated, in violation of principles set out in NAACP v. Alabama, 377 U.S. 288, 293-302.

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Sharon Brown, was the respondent in the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, appellant in the Appellate Court of Illinois, Fourth Judicial District, and petitioner in the Petition for Leave to Appeal filed in the Supreme Court of Illinois.

Respondents, Gene Brown and Glenda Brown, were petitioners in the Circuit Court, appellees in the Appellate Court, and respondents in the Supreme Court of Illinois.

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A. The statute [Chap. 110 1/2, par. 11-7, Ill.Rev.Stat.] is unconstitutional on its face, in violation of due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution, because it authorizes a court to deprive a parent of custody of his or her child--on the basis of "best interest" of the child--even if the parent is "fit," only where both parents are alive and not living together, while if the parents live together, or if one parent is dead, a parent cannot be deprived of custody unless the parent is "unfit." 20

B. As (mis)construed and (mis)applied by the Appellate Court, the statute unconstitutionally deprives petitioner of a liberty interest protected by the due process clause of the Fourteenth Amendment, in that it deprives petitioner of parental rights--that is, the mother's fundamental, constitutional right to the custody and care of her child--absent a finding that she is an unfit parent, and absent any showing of any compelling State interest justifying interference with such fundamental right. It permits a mother, who is a fit parent, to have her child taken from her to be raised by her father and step-mother because

the mother is a practicing lesbian
and because the father is
economically more secure.

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2. The Appellate Court's
affirmance improperly is based upon
a strained misreading of the statute
in order to avoid squarely ruling on
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(1d) Judgment Below

The Opinion of the Appellate Court of Illinois, Fourth District, No. 4-89-0393, decided December 31, 1990, affirming the judgment of the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, granting guardianship of Laurence T. Brown, a Minor, to petitioners-appellees [here, respondents] and visitation rights to respondent-appellant [here, petitioner], is attached as Appendix A to this Petition. It is reported as Matter of Estate of Brown, 207 Ill.App.3d 139, 565 N.E.2d 312, 152 Ill.Dec. 70.

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PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF THE STATE OF
ILLINOIS, FOURTH JUDICIAL DISTRICT

Petitioner, Sharon M. Brown
(hereafter, petitioner, or Sharon), the
biological mother of the minor, Laurence
T. Brown, prays that a writ of certiorari
issue to review the judgment of the

Appellate Court of Illinois, Fourth
Judicial District, affirming the order of
the Circuit Court of the Sixth Judicial
Circuit, Macon County, Illinois, granting
guardianship of the minor to respondents,
leave to appeal having been denied by the
Supreme Court of Illinois.

Judgment, Opinion and Orders Below

The Opinion of the Appellate Court of
Illinois, Fourth Judicial District,
affirming the Circuit Court's judgment,
is set out as App. A. It is reported at
207 Ill.App.3d 139, 565 N.E.2d 312, 152
Ill.Dec. 70.

The Order of the said Appellate Court,
denying Petition for Rehearing, dated
January 30, 1991, is attached as App. B.

The Order of the Supreme Court of Illinois, No. 71579, denying Petition for Leave to Appeal, dated June 5, 1991, is attached as App. C.

The Memorandum Decision (Judgment) of the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, entered on December 5, 1988, is attached as App. D.

(le) Jurisdictional Statement

On December 31, 1990, the Appellate Court of Illinois, Fourth Judicial District, filed its Opinion affirming the judgment of the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois. (App. A) A Petition for Rehearing, timely filed, was denied on January 30, 1991. (App. B) Petitioner's Petition for Leave to Appeal, timely

filed, was denied by the Supreme Court of Illinois on June 5, 1991. (App. C)

This Petition for Certiorari is timely filed within 90 days thereafter. Jurisdiction is invoked under 28 U.S.C. 1257(a) and Rules 10.1, 12.1 and 13.1 of this Court.

Constitutional Provisions

Petitioner maintains that her rights under the following provisions of the Fourteenth Amendment to the United States Constitution were violated by the Illinois courts' application of the statute at issue:

AMENDMENT XIV

"Sec. 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State ... shall deprive any person of ... liberty ... without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statute Involved

Petitioner maintains that the following statute, on its face and/or as applied, violates her federal constitutional rights as argued in this Petition:

"If both parents of a minor are living and are competent to transact their own business and are fit parents, they are entitled to the custody of the person of the minor and the direction of his education. If one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled. The parents have equal powers, rights and duties concerning the minor. If the parents live apart, the court for good reason may award the custody and education of the minor to either parent or to some other person."

Chap. 110 1/2, par. 11-7, Illinois
Revised Statutes 1985.

STATEMENT OF THE CASE

As the Opinion of the Appellate Court
states:

"This action involves an
intrafamilial dispute over the
guardianship of a minor child.
(Ill.Rev.Stat. 1985, ch. 110
1/2, par. 11-7.)" In the Matter
of the Estate of Laurence T.
Brown, [hereafter, Brown], 207
Ill.App.3d 139, 565 N.E.2d 312,
313, 152 Ill.Dec. 70, 71 (4
Dist. 1990).

Pursuant to the statute here at issue
--Ill.Rev.Stat. 1985, chap. 110 1/2, par.
11-7--respondents, the maternal
grandfather of the minor (that is,
petitioner's father) and his new wife
(petitioner's step-mother) sought
guardianship of the minor. While the
petition initially alleged that Sharon
was an unfit parent on the basis that she

was a practicing lesbian, after discovery progressed and after a home study of Sharon,² the pleadings were amended, asserting that even if Sharon was not unfit, respondents should have custody because it would be "in the best interest" of the minor.

Sharon was a single parent, having chosen to bear the child she conceived via rape. The biological father did not remain in the picture.

Sharon left her baby with her father and step-mother, for temporary care, while she successfully underwent treatment in a drug rehabilitation

2. The home study, which concluded Sharon was fit and could provide a proper home for Laurence, was conducted by LaNell Hill, a supervising social worker with Lutheran Children and Family Services of Illinois, with over 20 years experience in evaluating adoptive and foster care homes.

program. Two months later--although Sharon was then making all necessary arrangements to provide a home for herself and the child, including securing an apartment and employment--respondents filed the petition which resulted in the present litigation. The trial court ruled that it was in the best interest of the child to be in the custody of Sharon's father because she was a practicing lesbian and the father is economically more secure.

RAISING THE FEDERAL QUESTION

In the trial court, in the Appellate Court of Illinois, and in the Petition for Leave to Appeal to the Supreme Court of Illinois, Sharon asserted that the statute on its face and as applied, violates her federally guaranteed constitutional due process right to raise her child, absent a finding that she is "unfit"; and that the statute, on its face and as applied, violates equal protection of the laws and due process of law under the Fourteenth Amendment to the United States Constitution. The Circuit Court and the Appellate Court both ruled that the statute is constitutional, and was not unconstitutionally applied.

(App. 5-12; App. 50) The Supreme Court of Illinois denied discretionary review. (App. 23)

In the Supreme Court of Illinois, Sharon further asserted that the Appellate Court's manner of resolution of the constitutional issue, via purported reliance on an independent non-federal ground so as to avoid following precedent of the United States Supreme Court, further violated her due process rights. The Supreme Court of Illinois denied leave to appeal without opinion. (App. 23)

REASONS FOR GRANTING CERTIORARI

Summary of Argument³

This Court should scrutinize the Illinois courts' mangling of the rights of a natural mother, not found unfit, to guardianship, custody and care of her minor child.

3. We feel constrained to point out that it appears this Court is uniformly disinclined to exercise discretionary review via certiorari of judgments rendered by the intermediate appellate courts of the States. Considering the rarity of the highest court of review of Illinois (*i.e.*, the Supreme Court of Illinois) granting discretionary leave to appeal, a disproportionate number of litigants (at least in Illinois) are left with no recourse, as a practical matter, from the intermediate courts of review. We urge Your Honors to realize that for almost all Illinois litigants, the various Appellate Courts of Illinois, are indeed, the courts of last resort at the State level, and therefore to keep open the collective judicial mind to the merits of the instant Petition and the need for this Court to speak on the matters raised herein.

Absent a finding of the mother's unfitness, or of any superior interest of the State, the courts of Illinois have awarded the minor child to the maternal grandfather and his new wife, pursuant to a statutory provision which, on its face and/or as applied, operates to deprive Sharon of her fundamental parental rights as guaranteed by due process of law, and in a manner violative of equal protection of the laws.

Sharon Brown, who has been found by the trial court not to be an unfit mother, had her child taken away from her because she left the child with her father and his new wife (who cannot have a child) for a few months after the child's birth while she went through a drug rehabilitation program, and under Ill.Rev.Stat. 1985, Chap. 110 1/2, Par.

11-7, it has been determined that the child's grandfather and his wife can provide a better home for the child. The court's action was based upon Sharon being a practicing lesbian (App. 38-47), and her father being economically better able to provide for the child. (App. 47)

This action of the trial court is unconstitutional because (a) as a fit parent, Sharon has a constitutionally protected right to raise her own child, and placing the child with his grandfather violates Sharon's due process rights, and (b) the statute, Chap. 110 1/2, Par. 11-7, is unconstitutional because it permits placing the child with someone other than the parent for "good cause" without proving the parent's unfitness, only in the category where both parents are alive, but living apart,

whereas otherwise the statute requires a finding of parental unfitness.

Additionally, it is unconstitutional to deprive a fit parent of custody of her child merely because some believe it is better for the child not to be raised by a practicing lesbian, who has a stable, but low paying job, where the alternative is a foster parent (grandfather, with a greater income).

The Appellate Court's avoidance of the constitutional infirmity of the statute--by holding that to find that it is not in the best interest of the child to remain with the parent necessarily requires a finding of "unfitness" and then by relying on the action of the trial court, which expressly declined to find Sharon unfit--must be rejected as totally irrational and in violation of due

process, where the trial court, having the opportunity to find Sharon unfit, specifically refused to do so and instead applied a different standard of "good cause" or "best interest."

ARGUMENT

1. The Illinois statute under which petitioner has been deprived of custody of her minor child, even though petitioner was not found "unfit," and under which the said child was placed with petitioner's father and his new wife (respondents), is unconstitutional in violation of the due process and equal protection clauses.

Prefatory Statement: The Fundamental Constitutional Parental Rights Involved

Central to all aspects of the arguments made in this Petition, is the paramount interest of a biological parent in the right to bring up his or her child (absent, of course, some overriding State interest to the contrary). This paramount interest finds genesis and protection in the Constitution of the United States, via judicial interpretation of the due process clause of the Fourteenth Amendment. Before proceeding to demonstrate in the specific arguments

that follow how the State of Illinois has violated this fundamental, due process, parental right of Sharon Brown, petitioner, we first set out the constitutional basis of this Petition.

This Court repeatedly has recognized and given substance and meaning to the fundamental right of a person to raise one's own children. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645 (1972). In Stanley, id. at 651, as quoted in Brown, supra, 565 N.E.2d at 314, 152 Ill.Dec. at 72:

"The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska [(1923)], 262 U.S. 390, 399, "basic civil rights of man," Skinner v. Oklahoma [(1942)], 316 U.S. 535, 541, and "[r]ights far more precious *** than property rights," May v. Anderson [(1953)], 345 U.S. 528, 533. "It is cardinal with us that the custody, care and

nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

Prince v. Massachusetts

[(1944)], 321 U.S. 158, 166.'"

Dating back to their earliest recognition in Meyer v. Nebraska, supra, and Pierce v. Society of Sisters, 268 U.S. 510 (1925), this Court has nurtured and protected such fundamental familial rights. Concurring in Griswold v. Connecticut, 381 U.S. 479 (1965), Mr. Justice White commented:

"... liberty entitled to protection under the Fourteenth Amendment includes the right 'to marry, establish a home and bring up children.'" Id. at 502.

There exists a "private realm of family life that the state cannot enter" without some compelling justification. Prince v. Massachusetts, 321 U.S. 158, 166 (1944);

see also, The Constitution and the Family, 93 Harv. L. Rev. 1156, 1350-51 (1980).

Freedom of choice in family matters has long been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. See Wisconsin v. Yoder, supra; Meyer v. Nebraska, supra. The Supreme Court has consistently afforded families substantial protection from State intrusion into their private affairs. Meyer v. Nebraska, supra; Pierce v. Society of Sisters, supra; Prince v. Massachusetts, supra; Stanley v. Illinois, supra; Moore v. City of East Cleveland, 431 U.S. 494 (1977). This includes a parent's right to the care, custody and control of his or her child, which, as a fundamental right, must not

be interfered with, absent "a powerful countervailing interest." Stanley v. Illinois, supra, at 651.

It is precisely this right, which petitioner claims has been violated by the statute in question, facially and/or as applied by the Illinois courts.

A. The Illinois statute, Chap. 110 1/2, Par. 11-7, Ill.Rev.Stat. 1985, under which Sharon's child has been ordered placed in the guardianship and custody of respondents (Sharon's father and his new wife), is unconstitutional, because it deprives Sharon of her parental due process right, by way of an unreasonable classification in violation of equal protection of the laws.

Chapter 110 1/2, Paragraph 11-7 permits a minor child to be given to a person other than a parent without a finding that the parent is unfit, only in the situation where both parents are alive and living apart. Under the statute, if both parents are living,

competent to transact their own business, and living together, and if both are fit persons, they are entitled to custody, even if it would be in the best interest of the child for custody to be in some other person. Similarly, under the statute, if one parent is dead and the surviving parent is competent and fit, he or she has the absolute right to custody.

This statute sets up an invalid classification. It treats parents living apart differently from parents living together and from a sole surviving parent. This classification is unconstitutional. There is no rational basis to treat custody rights of a parent who is living apart from the other parent differently from those of parents who are living together, or of a sole surviving parent. Classifications which have no

rational basis, violate the Fourteenth Amendment guarantee of equal protection of the laws. Stanley v. Illinois, 405 U.S. 645 (1972); Plyler v. Doe, 457 U.S. 202, 216 (1982).

When a fundamental right is at stake, as here, the usual deference afforded to the legislature disappears, and courts apply heightened scrutiny to the legislature's classification. See Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). When a court applies the standard of strict scrutiny, it goes beyond looking for mere rationality in State legislation. Instead, the court must determine whether the statute furthers a compelling State interest, and whether the statute is necessary to accomplish that goal. See Bates v. Little Rock, 361 U.S. 516 (1960);

McLaughlin v. Florida, 379 U.S. 184 (1964).

A statute, as here, that results in the most intrusive State action imaginable--that of depriving a parent of her natural child--requires the strictest scrutiny. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Cf. Zablocki v. Redhail, 434 U.S. 374 (1978).

States have no compelling interest to require a finding of unfitness for one class of parents and not another.

Compare, cf. Stanley v. Illinois, supra.

Requiring a finding of unfitness for one class of parents while not requiring such finding for another class, violates equal protection of the laws. There is no rational basis for treating parents differently depending on whether one or both parents is alive. The

classification in the challenged statute is arbitrary and serves no reasonable State purpose. Dandridge v. Williams, 397 U.S. 471 (1970).

Sharon has had no contact with her child's father since the rape. Her son has had no contact with his father. The father pays no child support, and he is neither seeking custody nor contesting Sharon's sole custody of Laurence. To deprive Sharon of her fundamental right to her son simply because the father of the child, a rapist, happens to be alive, is a clear violation of the Equal Protection Clause.

Under this statute, if this rapist were dead, the court would be required to return the child to Sharon, because she is not an unfit parent. To deprive her of her parental rights because the father

is alive, though she has not been found unfit, simply is so irrational as to violate due process, as well as equal protection of the laws.

B. Even if not facially unconstitutional, the statute as (mis)construed and (mis)applied by the Appellate Court, unconstitutionally deprives Sharon of her fundamental, parental due process right, (i) without finding that she is an unfit parent, and (ii) without showing any compelling State interest justifying interference with such right. It permits a mother, who is a fit parent, to have her child taken from her to be raised by her father and step-mother because the mother is a practicing lesbian and because the father is economically more secure.

The court's bases, i.e., Sharon being a practicing lesbian, and that the father is more economically secure, are constitutionally insufficient to deprive her of her child.

Here, although the Circuit Court (which heard and considered all the

evidence), expressly declined to make any finding that Sharon was unfit, and specifically held that "the issue in this case is not whether Sharon is unfit," (App. 25-26), the court nonetheless awarded guardianship and custody of the minor child to respondents because Sharon was a lesbian and the father was economically better able to support the child. (App. 36-47)

The State has not shown that compelling interest which is prerequisite to interference with a fundamental right.

The State may not intervene in family life absent a compelling State interest to do so. Prince v. Massachusetts, supra, as when the parent has abused or neglected the child. No circumstances were presented below that would warrant the State's removing this child from his mother.

Unfitness, abuse or neglect was not shown. All that was demonstrated is that a recovered addict, who has controlled diabetes and works at a low paying job, was a practicing lesbian,⁴ and that her father had an economically more secure home.

There is not a sufficient basis for depriving Sharon of her child.

The State of Illinois' determination that a child can be removed from a parent and given to a non-parent based upon the parent's homosexuality, is an opinion so contrary to other authority as to be irrational and constitutionally invalid. It violates due process.

4. Sharon had committed a three year relationship with a responsible partner; she was not acting promiscuously. She and her partner (who is well-employed) share a house, where the home-study was done.

Modern acceptability of homosexual activity and more recent decisions demonstrate that homosexuality of a parent is an invalid basis for taking a child from a parent and giving the child to a non-parent.

In S.N.E. v. R.L.B., 699 P.2d 875, the Supreme Court of Alaska considered a custody dispute between a father and lesbian mother. The father maintained that his case did not involve sexual preference discrimination issues (much as respondents in the case at bar have stated that this is not a case about gay rights). The court disagreed, stating, "in marked contrast to the wealth of testimony that Mother is a lesbian, there is no suggestion that this has or is likely to affect the child adversely." In a footnote, the court mentioned, "the

superior court found that this relationship might be less stable and longlasting than Father's most recent marriage. However, this was essentially conjecture by the court, since there was no evidence Mother's relationship was not committed. Instead, the court relied on its own unsupported opinion that homosexual relationships are unstable and usually of short duration."

The Alaska court went on to say, "Simply put, it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian." Id. at 879.

In In the Matter of the Marriage of Cabalquinto, (1983) 669 P.2d 886, the Supreme Court of Washington, sitting en banc, considering a visitation issue between the mother and the non-custodial,

gay father, clarified the rule of law initially set out in Schuster v. Schuster (1978) 585 P.2d 130, that "homosexuality in and of itself is not a bar to custody". The court also pointed out that custody and visitation privileges are not to be used to penalize or reward parents for their conduct.

The Superior Court of New Jersey in M.P. v. S.P. (1979) 404 A.2d 1256, considered the change of custody from the divorced lesbian mother to the natural father. In leaving custody with this admitted practicing homosexual, the court considered the community disapproval of the mother, and said:

"Plaintiff's argument overlooks, too, the fact that the children's exposure to embarrassment is not dependent upon the identity of the parent with whom they happen to reside. Their discomfiture, if any, comes about not because of

living with defendant, but because she is their mother, because she is a lesbian, and because the community will not accept her. Neither the prejudices of the small community in which they live nor the curiosity of their peers about defendant's sexual nature will be abated by a change of custody. Hard facts must be faced. These are matters which courts cannot control, and there is little to gain by creating an artificial world where the children may dream that life is different than it is.

If defendant retains custody, it may be that because the community is intolerant of her differences these girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently

popular sentiment or prejudice." Id. at 1262-63.

The case most nearly on point with the case at bar is a probate case decided by the Supreme Judicial Court of Massachusetts in 1980. In that case, the natural mother, a lesbian, living in an active practicing homosexual relationship, and who had in her past suffered a variety of physical and emotional illnesses, had voluntarily placed her children with an unrelated third party. Massachusetts, like Illinois, favors the natural family. The court, quoting Custody of a Minor, Mass. ___, 389 N.E.2d 68, 73 (1979), said, "it is a fundamental principle that the Commonwealth may not attempt to force the breakup of a natural family without an affirmative showing of parental unfitness." Bezio v. Patenaude,

(1980) ___ Mass. ___, 410 N.E.2d 1207, 1211. In Bezio, there was substantial expert testimony by Dr. Alexandra Kaplan, a clinical psychologist and professor of psychology at the University of Massachusetts, who testified, "(t)here is no evidence at all that sexual preference of adults in the home has any detrimental impact on children... (M)any other issues influence child rearing. Sexual preference per se is typically not one of them... (M)ost children raised in homosexual situation become heterosexual as adults... There is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, maladjusted than children raised with a loving couple of mixed sex. (Sexual orientation of the

parent) is irrelevant to (the child's) mental health." Id. at 1215-16.

The court remanded the case, holding that "a finding that a parent is unfit to further the welfare of the child must be predicated upon parental behavior which adversely affects the child. The State may not deprive parents of custody of their children simply because their households fail to meet the ideals approved by the community ... (or) simply because the parents embrace ideologies or pursue life-styles at odds with the average." Id. at 1216.

All unbiased and credible psychiatric testimony demonstrates that Sharon's sexual orientation will not have an adverse effect on her son. Dr. Thomas E. Radecki was a court-appointed psychiatrist, not a "hired gun". He was

selected by the respondents, Gene and Glenda Brown. With no ax to grind, he performed an honest evaluation of Sharon. He reviewed relevant scientific studies regarding the effect on a child of being brought up by a homosexual mother, and he considered Sharon's prior drug and alcohol abuse and present diabetic condition. He also considered the issue of bonding. His testimony totally supports that it would be in the best interest of the child for parenting to be done by Sharon Brown.

Dr. Radecki testified consistent with his Report. There, he stated:

"After a thorough psychiatric evaluation it was apparent that the patient has a strong maternal attachment to raise her own child. She appears quite able to do so. She has been apparently quite stable over the past one and a half years. Psychiatric research on children raised by lesbian mothers show

that they do as well as those raised by heterosexual mothers. In my best psychiatric opinion, I think that Sharon Brown would be able to provide a very good home for her child and would likely do a quite good to very good job of raising her own child. Patient appears to have been very cooperative and sincere at conquering her cocaine problem with treatment one and a half years ago. I think that she would be able to provide a stable and positive environment for her child at the present time and in the future.

I also see no reason to think that her diabetic problems would in any way interfere with the patient providing a positive and healthy environment for the raising of her child.

The patient's active continuation in Narcotics Anonymous and counseling for substance abuse problems from the past is a positive sign of her stability and should be considered favorably in the determination of the likelihood of providing a positive parenting environment."

Sharon's homosexual relationship with Jill Lewandowski is not a casual

situation. At the time of the testimony, they had been living together in a committed relationship for more than two years. This relationship was maintained, despite the added strain of Sharon's involvement in the custody litigation, which required frequent trips to Decatur. Her partner's commitment is self-evident by her willingness to make herself and her home subject to investigation, and by her testimony before the court. This is more than some partners in heterosexual marriages might be willing to do, to assist their partner in getting the custody of a child not their own.

Dr. Radecki testified that it is not more likely that one would grow up as a homosexual if raised by a homosexual parent than if raised by a heterosexual

parent. He testified there is no risk of contracting Aids from being raised by a lesbian mother.

Here, without showing any basis for finding harm will come to the child by being raised by his mother, the child has been taken away on a dubious "best interest standard". As applied here, that violates a parent's right to raise her child.

In Parham v. J.R., 442 U.S. 584, 602 (1979), the Supreme Court examined the parental right to make decisions concerning the mental health of the child, noting:

"Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere

creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.' (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); other citations omitted.) The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries 447; 2 J. Kent, Commentaries on American Law 190."

Thus, the law presumes that absent a finding of unfitness, the natural parent is in a better position than the State to determine the best interests of the child. For this reason both the Juvenile Court Act (Ill. Rev. Stat. 1977, ch. 37, par. 705.9(3)) and the Adoption Act (Ill. Rev. Stat. 1977, ch. 40, pars. 1501 et.

seq.) require a finding of unfitness before the State can remove the child from the parent's custody.

Although the instant cause was designated a proceeding in guardianship under the Probate Act, the State here essentially conducted what amounts to a parental termination hearing. The result was precisely the same: the State permanently deprived a natural parent of the care and custody of her child.

Due process requires that if statutes or regulations infringe upon a constitutionally protected right, it must be shown that they reasonably and effectively carry out their goals. The State must show that it has employed the least restrictive means to effect its stated end. Pierce v. Society of Sisters, supra. In Moore v. City of East

Cleveland, 431 U.S. 494, 499 (1977), the Court held that when the government intrudes on choices concerning family, the Court must examine the importance of the governmental interests advanced and the extent to which they are served by the challenged regulations.

The statute here challenged, as interpreted by the Circuit Court and the Appellate Court, is counterproductive to the best interests of Laurence Brown, because it takes him away from a fit, natural parent. It is clearly in the child's best interest that the family unit be maintained. As was stated in Stanley v. Illinois, supra: "[T]he state registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if [the parent is fit] the state spites its

articulated goals when it needlessly separates [the child] from his family." Id. at 652-53. (Emphasis added.) While the State undeniably has a strong interest in protecting the best interests of children in order to promote a stable society, this interest has no meaning if the family unit is not also preserved and respected.

In this case, due process has been denied when, without a finding of her unfitness, Laurence is taken from his mother, Sharon.

2. The Appellate Court's affirmation
improperly is based upon a strained
misreading of the statute in order to
avoid squarely ruling on the federal
constitutional issues raised by Sharon,
in violation of principles set out in
NAACP v. Alabama, 377 U.S. 288, 293-302.

In violation of this Court's precepts
that a state court may not avoid a
constitutional ruling by relying on a so-
called independent non-federal ground
which appears to have been created by the
state reviewing court just for purposes
of that case, see NAACP v. Alabama, 377
U.S. 288, 293-302 (1964), here, the
Appellate Court avoided the crucial
constitutional issue simply by so
interpreting the challenged statute as to
hold that even though the Circuit Court
expressly failed to find Sharon unfit,
the statute implicitly requires such
finding in all cases removing a minor

child from parental custody. (App. 9-10;
Brown, supra, 565 N.E.2d at 315.)

The unprecedented holding that placing the child with a non-parent under the "best interest" standard of the statute also requires a finding of unfitness--though the statute expressly provides otherwise--is simply a "gimmick" adopted by the Appellate Court to avoid the inexorable equal protection challenge.

In effect, the Appellate Court retroactively has rewritten the statute, without rational basis, and then proceeded to decide the case on the basis of the rewritten statute--although the Circuit Court, which heard the evidence, expressly refused to find Sharon unfit.

Because the Circuit Court expressly refused to find Sharon unfit, it is absurd for the Appellate Court to uphold

the constitutionality of the statute on grounds that the trial court must find unfitness in all instances to remove a child from parental custody under the Act.

The Appellate Court's creation of a previously non-existent State ground in order to avoid a constitutional determination, itself is unconstitutional, and violates precepts of this Court prohibiting the artificial creation of a "non-federal ground" for avoidance of a decision holding a statute runs afoul of the federal Constitution. See NAACP v. Alabama, supra, at 297.

CONCLUSION

This Court should be concerned that the most fundamental, constitutional rights of a natural parent, have been stripped away from petitioner by the State.

The disturbing conclusion of the Appellate Court of Illinois, allowing a child to be taken from a parent not found unfit, absent any showing of compelling State interest, reached via rewriting a statute so as to avoid a clear-cut, facial equal protection challenge, should be scrutinized by this Court. We submit that Sharon's situation is just the tip of the proverbial iceberg, and shudder at the thought how easy it is, in Illinois, for a child to be taken from its parent, though there be no finding the parent is unfit.

For any or all of the reasons advanced in this Petition, certiorari should be allowed.

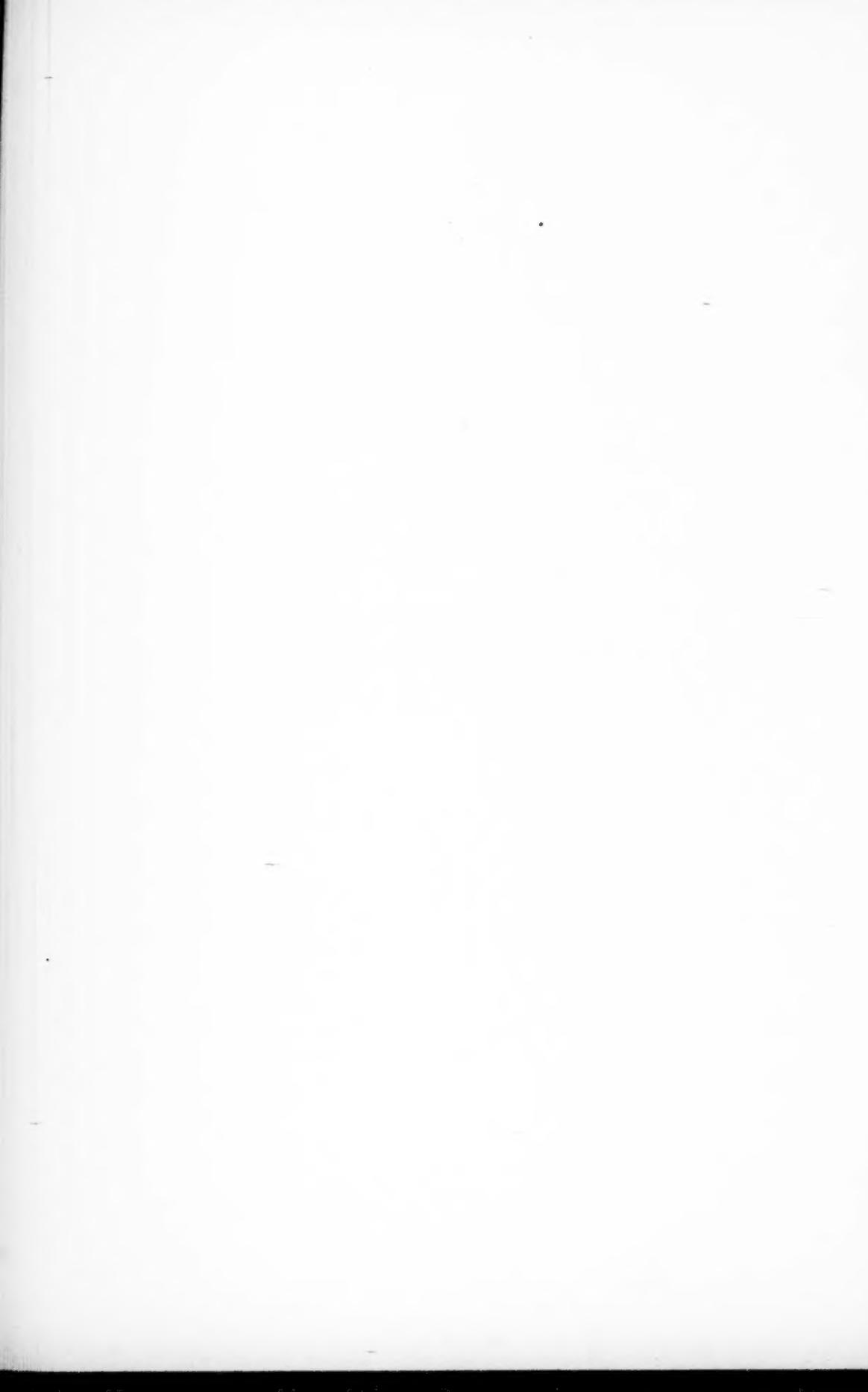
And, on the merits, this Court should hold the statute unconstitutional, and remand with appropriate directions.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner



A P P E N D I C E S



APPENDIX A

FILED
DEC. 31, 1990
Clerk Of The
Appellate Court, 4th Dist.

NO. 4-89-0393
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In the Matter of the) Appeal from
Estate of Laurence T.) Circuit Court
Brown, a Minor,) of Macon County
GENE BROWN and) No. 86P291
GLENDY BROWN,)
Petitioners-Appellees,) Honorable
v.) Warren A.
SHARON M. BROWN,) Sappington,
Respondent-Appellant.) Judge Presiding.

JUSTICE KNECHT delivered the opinion
of the court:

This action involves an intrafamilial
dispute over the guardianship of a minor
child. (Ill. Rev. Stat. 1985, ch. 110
1/2, par. 11-7.) The petitioners, Gene
and Glenda Brown, are the maternal
grandfather of the minor child and his
wife. The respondent, Sharon M. Brown,
is the natural mother of the minor
child. Petitioners were named co-

guardians by the circuit court of Macon County, and respondent appeals. We affirm.

On July 30, 1986, the petitioners filed a petition for guardianship over the minor child in the circuit court of Macon County, Illinois. The petition, as later amended, alternately alleged: (1) the respondent was unfit as a parent to have custody of the minor child; (2) the petitioners were fit persons to have custody of the minor child; and (3) it would be in the best interest of that child to appoint the petitioners as his legal guardians for custody purposes. (Ill. Rev. Stat. 1985, ch. 110 1/2, par. 11-7.) On December 5, 1988, the circuit court entered a memorandum decision awarding child custody to the petitioners and visitation rights to the respondent. On January 12, 1989, the respondent filed a motion for

App. 3

reconsideration of the memorandum decision. On March 7, 1989, the circuit court entered an order appointing the petitioners as co-guardians over the minor child. On March 27, 1989, the respondent filed her notice of appeal in the action.

The respondent raises three issues on appeal: (1) whether the guardianship provision of the Probate Act of 1975 (Act) is unconstitutional (Ill. Rev. Stat. 1987, ch. 110 1/2, par. 11-7); (2) whether the petitioners lack standing to initiate the proceeding for guardianship over the minor child (Ill. Rev. Stat. 1987, ch. 40, par. 601(b)(2)); and (3) whether the appointment of the petitioners as co-guardians over the minor child is against the manifest weight of the evidence.

We first address the merits of a procedural motion taken with this action

on appeal. The petitioners contend the brief filed by the respondent is not in compliance with the procedural practice rules governing appeals. (See 107 Ill. 2d Rules 323, 326, 341, 342.)

Petitioners request both the brief be stricken and the appeal be dismissed as sanctions for failure to comply with these rules.

The procedural practice rules have the force of law in Illinois. (Portock v. Freeman (1977), 53 Ill. App. 3d 1027, 1031, 369 N.E.2d 201, 204.) Litigants must comply with these rules in filing their briefs on appeal. Absent substantial compliance with the procedural practice rules, we may, in the proper exercise of discretion, sanction that litigant by striking the brief and dismissing the appeal. Mead v. Board of Review (1986), 143 Ill. App. 3d 1088, 1092, 494 N.E.2d 171, 174-75.

We have examined the brief of the respondent in light of the procedural challenge. The brief of the respondent does not so flagrantly violate the cited practice rules as to preclude review of the cause on appeal. "[W]here none of the purported violations of [the procedural practice rules] are so flagrant as to hinder or preclude review, then either the striking of a brief or the dismissal of an appeal is *** unwarranted." (In re Marriage of Betts (1987), 155 Ill. App. 3d 85, 91, 507 N.E.2d 912, 916.) Accordingly, we deny the motion of the petitioners.

The respondent initially contends the guardianship provision of the Act is unconstitutional. (Ill. Rev. Stat. 1987, ch. 110 1/2, par. 11-7.) We disagree.

As a historical matter, the United States Supreme Court has accorded great deference to the relationship between

parent and child in its decisions.

(Parham v. J.R. (1979), 442 U.S 584, 602, 61 L. Ed. 2d 101, 118, 99 S. Ct. 2493, 2504.) A summary of that decisional course offers enlightening commentary on familial relations:

"The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska [(1923)], 262 U.S. 390, 399[, 67 L. Ed. 1042, 1045, 43 S. Ct. 625, 626], 'basic civil rights of man,' Skinner v. Oklahoma [(1942)], 316 U.S. 535, 541[, 86 L. Ed. 1655, 1660, 62 S. Ct. 1110, 1113], and '[r]ights far more precious *** than property rights,' May v. Anderson [(1953)], 345 U.S. 528, 533[, 97 L. Ed. 1221, 1226, 73 S. Ct. 840, 843]. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'

Prince v. Massachusetts [(1944)], 321 U.S. 158, 166[, 88 L. Ed. 645, 652, 64 S. Ct. 438, 442]." Stanley v. Illinois (1972), 405 U.S. 645, 651, 31 L. Ed. 2d 551, 558-59, 92 S. Ct. 1208, 1212-13.

Illinois law, in accordance with these

decisions, defers in the first instance to the relationship between parent and child in both custody and guardianship proceedings. (People ex rel. Edwards v. Livingston (1969), 42 Ill. 2d 201, 247 N.E.2d 417; In re Custody of Townsend (1981), 86 Ill. 2d 502, 427 N.E.2d 1231.) That law, as expressed in the Act, provides:

"If both parents of a minor are living and are competent to transact their own business and are fit parents, they are entitled to the custody of the person of the minor and the direction of his education. If one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled. The parents have equal powers, rights and duties concerning the minor. If the parents live apart, the court for good reason may award the custody and education of the minor to either parent or to some other person." Ill. Rev. Stat. 1987, ch. 110 1/2, par. 11-7.

This section represents a codification of the long-standing superior rights .

doctrine. (Livingston, 42 Ill. 2d at 209-10, 247 N.E.2d at 422; see also In re Person and Estate of Newsome (1988), 173 Ill. App. 3d 376, 379, 527 N.E.2d 524, 525.) Under that doctrine, a natural parent is presumed to have a superior right to the care, control, and custody of minor children. The superior rights doctrine is not absolute. A natural parent may be required to yield custody rights if the best interests of a minor child will be served. Livingston, 42 Ill. 2d at 208-10, 247 N.E.2d at 421-22; Townsend, 86 Ill. 2d at 508-09, 427 N.E.2d at 1234-35.

The equal protection challenge is not persuasive. (See Montgomery v. Roudez (1987), 156 Ill. App. 3d 262, 269-70, 509 N.E.2d 499, 504-05.) Respondent contends the statute sets up an unreasonable and discriminatory classification so that parents who live apart are treated

differently than parents who live together. We do not view the statute in this light.

Respondent claims that this discriminatory classification arises because, under section 11-7 of the Act, a child may be removed from parents who live together or from a surviving parent only after a finding that such parent is not a "fit person," whereas if the parents live apart, no such finding is required. In Townsend, however, the supreme court construed that section as requiring a third party seeking to obtain custody of a child to "demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody and further [to] show that it is in the child's best interests that the third party be awarded the care, custody and control of the minor."

(Townsend, 86 Ill. 2d at 510-11, 427

N.E.2d at 1235-36.) The phrase, to "demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody" is legally equivalent to requiring a demonstration that a parent is not "fit." Thus, as so construed, all parents under section 11-7 of the Act must be shown to be not fit. (We note parenthetically that the parent of whom the supreme court was speaking in Townsend was the father who was living apart from the mother, thus making clear the application of the language quoted from Townsend to parents described in the last sentence of section 11-7.)

In light of this statutory interpretation, the respondent cannot establish any disparity in the treatment of litigant parents in guardianship proceedings. (Helvey v. Rednour (1980), 86 Ill. App. 3d 154, 158-59, 408 N.E.2d

17, 21.) That interpretation subordinates the operation of the superior rights doctrine within the context of the best interest standard. Livingston, 42 Ill. 2d at 208-10, 247 N.E.2d at 421-22; Townsend, 86 Ill. 2d at 508-09, 427 N.E.2d at 1234-35.

The due process challenge of the respondent also fails. (See Montgomery, 156 Ill. App. 3d at 269, 509 N.E.2d at 504.) The respondent was accorded her full evidentiary rights at a fair hearing on the guardianship petition. (Ill. Rev. Stat. 1985, ch. 110 1/2, par. 11-10.1.) The statute permits the court to award custody to either parent or a third party only if a good reason is demonstrated, and it is in the best interests of the child. Thus, petitioners first had to meet a limited standing requirement, which we will discuss below, to go forward on the petition. Then, the

petitioners were required to prove a good reason existed for the award of custody to some person other than respondent. They did so here by showing respondent had serious parental deficiencies relating to health, finances, and stability. While the trial court did not specifically find neglect on her part, it is clear from the findings she neglected her son by near abandonment, by abusing her body with drugs and alcohol while pregnant, and by not providing a stable home for him. Then, petitioners proved to the trial court's satisfaction it was in the child's best interests custody be awarded to them. We conclude this framework accorded due process to respondent.

After carefully weighing the evidence on the welfare of the minor child, the circuit court entered an order awarding custody to the petitioners and visitation

to the respondent. Contrary to her contention, the respondent has not suffered a total deprivation of her parental rights under this order. The respondent is free to develop and foster her familial relationship with the minor child in the hopeful expectation of terminating guardianship. (See In re Estate of Becton (1985), 130 Ill. App. 3d 763, 773-74, 474 N.E.2d 1318, 1326.) While there are no specific review procedures under the Act, the respondent, who now has visitation rights, might well in the future seek expanded visitation and a return of custody to her. The guardianship order did not terminate her parental rights or permanently bar her from ever being her son's custodian or guardian.

The respondent next contends the petitioners lack standing to initiate a proceeding for guardianship over the

minor child. (Ill. Rev. Stat. 1985, ch. 40, par. 601(b)(2).) We find no merit in this contention. See In re Custody of McCarthy (1987), 157 Ill. App. 3d 377, 380-81, 510 N.E.2d 555, 556-57.

A review of the record indicates the respondent failed to raise any argument on standing in the circuit court. Arguments not raised in the circuit court are deemed to have been waived on appeal. See Greer v. Illinois Housing Development Authority (1988), 122 Ill. 2d 462, 508, 524 N.E.2d 561, 582.

Were we to address the standing of the petitioners to initiate this guardianship proceeding, we would find standing exists.

As a jurisdictional matter, the petitioners had to satisfy a limited standing requirement to file their petition for guardianship over the minor child. (See Newsome, 173 Ill. App. 3d at

379, 527 N.E.2d at 525.) That requirement provides in pertinent part:

"(b) A child custody proceeding is commenced in the court:

* * *

(2) by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in physical custody of one of his parents." (Emphasis added.)
(Ill. Rev. Stat. 1985, ch. 40, par. 601(b)(2).)

The limited standing requirement thus protects both the custody rights of the natural parent and the environmental stability of the minor child. See In re Custody of Menconi (1983), 117 Ill. App. 3d 394, 396-97, 453 N.E.2d 835, 838; Ill. Rev. Stat. 1985, ch. 40, pars, 601, 602(a)(4), (a)(5).

There is no litmus test to determine standing. The determination depends on the particular facts of the individual guardianship action. (In re Marriage of

Carey (1989), 188 Ill. App. 3d 1040, 1047, 544 N.E.2d 1293, 1297.) The facts of obvious importance here concern the legal incidents of custody: (1) who has immediate physical possession of the minor child; (2) how that person took over control; and (3) the nature, manner, and duration of possession. (In re Marriage of Santa Cruz (1988), 172 Ill. App. 3d 775, 783, 527 N.E.2d 131, 136.) Accordingly, the standing requirement is satisfied when the petitioners depend on the voluntary, not fortuitous, relinquishment of child custody. See In re Custody of Peterson (1986), 112 Ill. 2d 48, 53-55, 491 N.E.2d 1150, 1152-53.

In this action, the respondent voluntarily relinquished some degree of control of the minor child to the petitioners. The respondent entered a rehabilitation program for substance abuse following the birth of the minor

child in late February 1986. She arranged for the petitioners to assume care, control, and custody of the minor child in that interim time period. The respondent then moved into the residence of the petitioners upon her release from the rehabilitation program in late March 1986. She left alone from that residence without explanation, remaining incommunicado, during the time period between mid-April and early June 1986. In July 1986 she signed a notarized document designed to grant petitioners permission to care for the child and to obtain medical or other care for him. The respondent reestablished contact through visitation on a somewhat sporadic basis. Under these circumstances, the respondent has defaulted on her parental responsibilities, leaving an integrated familial relationship between the minor child and the petitioners. See Menconi,

117 Ill. App. 3d at 398-99, 453 N.E.2d at 839.

The respondent last contends the appointment of the petitioners as co-guardians over the minor child is against the manifest weight of the evidence. We disagree.

The circuit court had the superior opportunity to determine custody in accordance with the best interests of the minor child. That appointment will not be disturbed unless contrary to the manifest weight of the evidence. Becton, 130 Ill. App. 3d at 769, 474 N.E.2d at 1323.

The best interest standard considers both the present and the prospective welfare of the minor child. Such consideration is not the simplest of matters. (Eaton v. Eaton (1977), 50 Ill. App. 3d 306, 313, 365 N.E.2d 647, 653; Ill. Rev. Stat. 1985, ch. 40, par.

602.) It requires a deep appreciation of the emotional impact that both custodial and guardianship determinations have on any familial relationship between litigants. See Smith v. Organization of Foster Families for Equality & Reform (1977), 431 U.S. 816, 833, 53 L. Ed. 2d 14, 28, 97 S. Ct. 2094, 2103.

On appeal, we must view the evidence in the light most favorable to the litigant prevailing below in the action. (Becton, 130 Ill. App. 3d at 770, 474 N.E.2d at 1324.) Applying this rule, we find the guardianship appointment is not contrary to the manifest weight of the evidence. As integrated familial relationship already exists between the minor child and the petitioners. They have sufficient resources to meet the reasonable needs of the minor child. It is a stable home with a wholesome environment. In

contrast, the respondent has yet to establish a meaningful familial relationship with the minor child. She is barely self-supporting in the aftermath of bankruptcy. Her parental life-style lacks any continuous pattern of stability. The record and the trial court's findings recount a myriad of problems which we need not recount that clearly support the guardianship order. Giving consideration to respondent's superior right as a natural parent as required by Townsend, the best interest standard still clearly requires the minor child remain in the custody of the petitioners. See Montgomery, 156 Ill. App. 3d at 267-68, 509 N.E.2d at 503-04.

The order of the Macon County circuit court as to guardianship over the minor child is affirmed.

Affirmed.

STEIGMANN and McCULLOUGH, JJ., concur.

APPENDIX B

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

Clerk of the Court Research Director
(217) 782-2586 (217) 782-3528

DATE: 01/30/91

Research Director
(217) 782-3528

DATE: 01/30/91
RE: In the Matter Estate of Laurence T.
Brown, a Minor
General No. 4-89-0393
Macon 86P291

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court (Rule 368(b)) is filed in this court.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:bt

TO: Frederick F. Cohn
Attorney at Law
205 West Wacker Dr., Suite 1515
Chicago, IL 60606

Joseph W. Vigneri
Attorney at Law
136 W. Washington Street
P.O. Box 909
Decatur, IL 62525-0909

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Attorney at Law
500 Citizens Building
250 North Water Street
Decatur, IL 62525

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APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

71579

June 5, 1991

Mr. Frederick F. Cohn
Attorney at Law
205 W. Wacker Dr., S#1515
Chicago, IL 60606

No. 71579 - In the Matter of the Estate
of Laurance T. Brown, a
Minor (Gene Brown et al.,
respondents, v. Sharon M.
Brown, petitioner).
Leave to appeal, Appellate
Court, Fourth District.

The Supreme Court today DENIED the
petition for leave to appeal in the above
entitled cause.

The mandate of this Court will issue
to the Appellate Court on June 27, 1991.

APPENDIX D

November 30, 1988

Mr. Joseph W. Vigneri	Mr. Mark D. Gibson
Attorney at Law	Attorney at Law
135 West Washington	P.O. Box 871
Street	Decatur, Illinois
P.O. Box 909	62525
Decatur, Illinois 62525	

Mrs. Joyce A. Matuzak
Attorney at Law
205 W. Wacker Drive
Suite 1515
Chicago, Illinois 60606

In Re: 86-P-291 Laurence T. Brown,
a Minor

Memorandum of Decision

The issue in this cause is whether it is in the best interest of Laurence T. Brown (hereinafter referred to as Larry) to be placed in the custody of the Petitioners, who are Larry's maternal grandfather and stepgrandmother (hereinafter referred to as Gene and Glenda) or the respondent, who is Larry's biological mother (hereinafter referred to as Sharon).

The Amended Petition for Appointment

of Guardian was filed herein on May 28, 1987 under Section 11-7 of the Probate Act (Ill. Rev. Stat. 1985, Ch. 110 1/2, Par. 1-1 et seq.) which provides as follows:

Parental rights to custody. If both parents of a minor are living and are competent to transact their own business and are fit parents, they are entitled to the custody of the person of the minor and the direction of his education. If one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled. The parents have equal powers, rights and duties concerning the minor. If the parents live apart, the court for good reason may award the custody and education of the minor to either parent or to some other person.

It is significant that this action was not commenced under either the Adoption Act (Ill. Rev. Stat. 1985, Ch. 40, Sec. 1501 et seq.) or the Juvenile Court Act (Ill. Rev. Stat. 1985, Ch. 37, Sec. 701-1 et seq.) both of which are predicated upon a finding of unfitness and a

termination of parental rights.

Consequently, the issue in this case is not whether Sharon is unfit. Rather, this proceeding is analogous to a custody hearing under the Illinois Marriage and Dissolution Act (Ill. Rev. Stat. 1985, Ch. 40, Sec. 1-1 et seq.) which is, also, predicated upon a determination of the child's best interest. Illinois Supreme Court Justice Daniel P. Ward explicated "best interest" in the case entitled, *In Re Custody of Townsend*, 86 Ill.2d 502, October 21, 1981, as follows:

In child-custody disputes it is an accepted presumption that the right or interest of a natural parent in the care, custody and control of a child is superior to the claim of a third person. The presumption is not absolute and serves only as one of several factors used by courts in resolving the ultimately controlling question of where the best interests of the child lie. (See *People ex rel. Edwards v. Livingston* (1969), 42 Ill.2d 201; *Giacopelli v. Florence* *Crittenton Home* (1959), 16 Ill.2d 556; *Cormack v. Marshall*

(1904), 211 Ill. 519, Halstead v. Halstead (1966), 259 Iowa 526, 144 N.W.2d 861; Annot., 45 A.L.R.3d 216 (1972); Annot., 31 A.L.R.3d 1187 (1970).) A court need not find that the natural parent is unfit or has forfeited his custodial rights before awarding custody to another person if the best interests of the child will be served. (People ex rel. Edwards v. Livingston (1969), 42 Ill.2d 201, 209; Soldner v. Soldner (1979), 69 Ill.App.3d 97.) This standard or "guiding star" (Nye v. Nye (1952), 411 Ill. 408, 415) is a simple one designed to accommodate the often complex and unique circumstances of a particular case. The superior-right doctrine or presumption in favor of the natural parent, however, need not always be applied automatically, in conjunction with the best-interests-of-the-child standard. (Page 508)

The right and correlative responsibility of a parent to care for his or her child is fundamental and as ancient as mankind. This basic human right and the superior-right doctrine find legislative expression in the Probate Act of 1975 (Ill. Rev. Stat. 1979, Ch. 110 1/2, par. 1-1 et seq.). (Page 509)

The Supreme Court has recognized the primacy of a natural parent's right to the custody of the child. In

Stanley v. Illinois (1972), 405 U.S. 645, 31 L.Ed. 2d 551, 92 S. Ct. 1208, the court observed:

"The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' Kovacs v. Cooper [(1949)], 336 U.S. 77, 95, 93 L. Ed. 513, 527, 69 S. Ct. 448, 458] (Frankfurter, J., concurring). (Pages 512, 513)

It is obvious that in a custody dispute a court should give weight to the claim of a third person who has had actual or legal custody of the child for a substantial period of time, especially if the evidence shows that the child has become an integral member of a true family unit. (See generally Halstead v. Halstead (1966), 259 Iowa 526, 144 N.W.2d 861; Look v. Look (1974), 21 Ill.App.3d 454.) But however important this factor may be in a given case, it does not rise to the level of a presumption so as to "neutralize" the superior-right doctrine or transpose the

superior right from the natural parent to the third person. It remains simply a factor to consider in ascertaining what will best serve the interests of the child. Of course, in a given case it may be the determining factor in the custody decision. (Page 515)

In the instant case, the Court finds that Sharon is 34 years old and that Larry is 2 1/2 years old, having been born in Chicago, Illinois, February 20, 1986. Further, Sharon's testimony that Larry was conceived when she was raped is unimpeached. There is no evidence that the rape was reported to the police, that Sharon filed a paternity suit against the putative father, that the putative father was notified of either the birth or this proceeding, or that Sharon ever requested assistance, monetary or otherwise, from the putative father. Moreover, Sharon refused to disclose the name of the putative father to the Guardian Ad Litem herein until she was ordered do to so on

May 14, 1987.

Furthermore, the Court finds that during her pregnancy, Sharon was addicted to both marijuana and cocaine and that the effect of the use of these drugs on Larry cannot now be determined because of Larry's tender years. In addition, Sharon testified that she was a diabetic and had cocaine in her blood when Larry was born.

Further, the Court finds that shortly after Larry's birth, Sharon called her mother in Decatur, who "made arrangements" for Gene and Glenda to go to Chicago, get Larry, and return to Decatur to care for him on a temporary basis. Immediately upon Sharon's release, after delivery, Sharon entered a resident drug rehabilitation center in Chicago for about 3 weeks. Upon discharge from the drug rehabilitation center, Sharon came to Decatur and lived

in the home of Gene and Glenda, with Larry, for about 3 weeks. On or before April 20, 1986, Sharon returned to the drug environment in Chicago where she was living prior to Larry's birth. During the month of April, 1986, Sharon started dating Jill Lewandowski (hereinafter referred to as Jill) and they rented the apartment, in which they now live in a lesbian relationship.

Furthermore, Sharon testified that after she and Jill moved into the apartment, she told Gene that she wanted to take Larry back to Chicago, but that Gene said she did not have the physical, emotional, and financial stability to assume the responsibilities of motherhood at that time. Although Gene and Glenda testified that Sharon acceded to the instabilities, Sharon testified that she was afraid of her father and that he has a dominant personality. In this regard,

it is interesting to note that other members of the family testified that Sharon and Gene are obstinate, dynamic, and manipulative but charming. In any event, the Court finds that Sharon is a diabetic, that she experienced a number of blackouts, that she attended Alcohol and Drug Anonymous meetings, and that she filed bankruptcy between the time that Larry was born and the time the Petition was filed herein.

The Court further finds that Gene Brown is now 63 years old; his second wife, Glenda, is 41 years old. Gene and Sharon's mother were married for more than 30 years; they had 3 children; 2 of the 3 children are homosexuals; the third, Kathleen, is, at least prima facie, the most desirable person to be named as Larry's guardian. Notwithstanding, the Court also finds that Gene owns and operates his own independent agency

in Decatur at the present time, after having worked in the insurance industry for more than 30 years. During those years, Gene drank excessively, was verbally (but not physically) abusive to Sharon's mother, and spent very little time with his children. Sharon's mother pretty much raised the children as a married single if not a single parent. The stress and anxieties experienced by Sharon's mother when combined with Gene's dominant personality and consumption of alcohol led to arguments and eventually a divorce. However, the relationship between Gene and his first wife appeared to be civil during these proceedings.

Further, Gene and Glenda, as well as other members of the family, testified that Gene and Glenda have a stable and loving relationship and drink very little alcohol at the present time. Ron Allen, Pastor of The First Presbyterian Church

of Decatur, was called by Gene and Glenda and testified that he officiated their wedding and that they have a good marriage.

Dr. Michael A. Campion, Ph.D. (in Psychology), was called by Gene and Glenda and testified that the physical environment of the home of Gene and Glenda was satisfactory. Lanell Hill, Social Work Supervisor for Lutheran Child and Family Services of Illinois, was called by Sharon, and testified that the physical environment of Sharon's apartment was satisfactory.

Dr. Campion, also, testified that "bonding" has occurred between Gene and Glenda and Larry, and that it would be traumatic to change custody of Larry from Gene and Glenda to Sharon, at this time, for a number of reasons, including, but not limited to Sharon's diabetic condition, Sharon's unstable environment

arising out of her lesbian relationship with an increased probability of sexually-transmitted diseases and the enhanced probability that Sharon would return to drug and alcohol abuse.

Incidentally, Dr. Campion did not have a personal consultation with Sharon.

Dr. Thomas E. Radecki (Psychiatrist) was appointed by the Court to examine Sharon and testified that the probability that Sharon would resume alcohol and drug abuse was greater than it is for a person who has not used alcohol or drugs. On the other hand, Dr. Radecki testified, in summary, that Sharon has a strong maternal attachment for her son, that she would be able to provide a very good home for him, that she would be able to provide a stable and positive environment, that her diabetic problems would not interfere with her raising her son, that Sharon's homosexual

relationship would not have an adverse effect on the child, and that Sharon's participation in the Alcohol and Drug Anonymous activities are a positive sign of stability. Dr. Radecki further testified that he thought Sharon was gay when he first saw her, that she looks like a gay person, and that she still has some hostility toward the rapist (Larry's putative father). Although Dr. Radecki testified that a child raised by a Lesbian would not experience psychological problems, Dr. Radecki did not differentiate between a lesbian relationship that was private and discreet and a relationship that was open and notorious with or without continuous cohabitation. Moreover, he did not differentiate between or among those Lesbian mothers who are raped or who become pregnant voluntarily within or outside the bonds of matrimony or who

are, in fact, bisexual. Furthermore, he did not differentiate between children who live in a lesbian environment throughout their lives from those who live in a heterosexual environment for a part of their lives and a homosexual environment during another part of their lives. In this regard, the discussion found in the Family Law Quarterly as published by the American Bar Association, Section of Family Law in Vol. 22, No. 1, Spring, 1988, in an article entitled "Custody Determination Involving the Homosexual Parent" authored by Robert A. Beargie, cited and filed herein by the Guardian Ad Litem, Attorney Mark Gibson, is informative.

Although Sharon's sister testified that Sharon was involved in a heterosexual relationship some 10 years ago, Sharon told the Court that she was not familiar with the studies of Masters

and Johnson indicating that a change from homosexuality to heterosexuality was possible. Further, Sharon intimated to the Court that she was happy as a homosexual and was not interested in the possibility of becoming a heterosexual. Furthermore, although Sharon testified that she would send Larry to a Catholic school, she indicated that the last church service she attended was Christmas, 1986. Furthermore, she testified that God loved her and made her what she is but that she could not understand why the Pope would not accept her as she is.

Supreme Court Justice Robert C. Underwood discussed cohabitation of a custodial parent with a member of the opposite sex, the standards of conduct under the Illinois Marriage and Dissolution Act (Ill. Rev. Stat. 1977, Ch. 40, Par. 101 et seq.) and the best

interest of a child under these circumstances in the case of *Jarrett v. Jarrett*, 78 Ill.2d 337, as follows:

In April, 1977, five months after the divorce, Jacqueline informed Walter that she planned to have her boyfriend, Wayne Hammon, move into the family home with her. Walter protested, but Hammon moved in on May 1, 1977. Jacqueline and Hammon thereafter cohabited in the Jarrett home but did not marry.

The children, who were not "overly enthused" when they first learned that Hammon would move into the family home with them, asked Jacqueline if she intended to marry Hammon, but Jacqueline responded that she did not know. At the modification hearing Jacqueline testified that she did not want to remarry because it was too soon after her divorce; because she did not believe that a marriage license makes a relationship; and because the divorce decree required her to sell the family home within six months after remarriage. She did not want to sell the house because the children did not want to move and she could not afford to do so. Jacqueline explained to the children that some people thought it was wrong for an unmarried man and woman to live together but she thought

that what mattered was that they loved each other. Jacqueline testified that she told some neighbors that Hammon would move in with her but that she had not received any adverse comments. Jacqueline further testified that the children seemed to develop an affectionate relationship with Hammon, who played with them, helped them with their homework, and verbally disciplined them. Both Jacqueline and Hammon testified at the hearing that they did not at that time have any plans to marry. In oral argument before this court Jacqueline's counsel conceded that she and Hammon were still living together unmarried. (Pages 341, 342)

The chief issue in this case is whether a change of custody predicated upon the open and continuing cohabitation of the custodial parent with a member of the opposite sex is contrary to the manifest weight of the evidence in the absence of any tangible evidence of contemporaneous adverse effect upon the minor children. Considering the principles previously enunciated, and the statutory provisions, and prior decisions of the courts of this State, we conclude that under the facts in this case the trial court properly transferred custody of the Jarrett children from Jacqueline to Walter Jarrett.

The relevant standards of conduct are expressed in the statutes of this State: Section 11-8 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, Ch. 38, Par. 11-8) provides that "[a]ny person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious." In *Hewitt v. Hewitt* (1979), 77 Ill.2d 49, 61-62, we emphasized the refusal of the General Assembly in enacting the new Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1977, Ch. 40, Par. 101 et seq.) to sanction any nonmarital relationships and its declaration of the purpose to "strengthen and preserve the integrity of marriage and safeguard family relationships" (Ill. Rev. Stat. 1977, Ch. 40, Par. 102(2)).

Jacqueline argues, however, that her conduct does not affront public morality because such conduct is now widely accepted, and cites 1978 Census Bureau statistics that show 1.1 million households composed of an unmarried man and woman, close to a quarter of which also include at least one child. This is essentially the same argument we rejected last term in *Hewitt v. Hewitt* (1979), 77 Ill.2d 49, and it is equally unpersuasive here. The number of people living in such households forms only a small

percentage of the adult population, but more to the point, the statutory interpretation urged upon us by Jacqueline simply nullifies the fornication statute. The logical conclusion of her argument is that the statutory prohibitions are void as to those who believe the proscribed acts are not immoral, or, for one reason or another, need not be heeded. So stated, of course, the argument defeats itself. The rules which our society enacts for the governance of its members are not limited to those who agree with those rules--they are equally binding on the dissenters. The fornication statute and the Illinois Marriage and Dissolution of Marriage Act evidence the relevant moral standards of this State, as declared by our legislature. The open and notorious limitation on the former's prohibitions reflects both a disinclination to criminalize purely private relationships and a recognition that open fornication represents a graver threat to public morality than private violations. Conduct of that nature, when it is open, not only violates the statutorily expressed moral standards of the State, but also encourages others to violate those standards, and debases public morality. While we agree that the statute does not penalize

conduct which is essentially private and discreet (People v. Cessna (1976), 42 Ill.App.3d 746, 749), Jacqueline's conduct has been neither, for she has discussed this relationship and her rationalization of it with at least her children, her former husband and her neighbors. It is, in our judgment, clear that her conduct offends prevailing public policy. Lyman v. People (1902), 198 Ill. 544, 549-50; Searls v. People (1852), 13 Ill. 597, 598; People v. Potter (1943), 319 Ill.App. 409, 410-11, 416.

Jacqueline's disregard for existing standards of conduct instructs her children, by example, that they, too, may ignore them (see Stark v. Stark (1973), 13 Ill.App.3d 35; Brown v. Brown (1977), 218 Va. 196, 237 S.E.2d 89), and could well encourage the children to engage in similar activity in the future. That factor, of course, supports the trial court's conclusion that their daily presence in that environment was injurious to the moral well-being and development of the children. (Pages 345, 346, 347)

Further, Ann Elizabeth Shiel Daly was called by Sharon and indicated that "... diabetes should not stand in the way of Sharon Brown to be a fit parent."

(Evidence Deposition dated January 9, 1988, Lines 4 and 5 at Page 56) and "...it is safer to have another adult present than for this individual to live alone with a very young child, provided that adult has the proper knowledge" (Evidence Deposition dated January 9, 1988, Lines 21-23, Page 57). In addition, although Sharon's treating physician, Gerald W. Wiesberg, M.D., indicated that Sharon has her diabetes under control, he, also, indicated that it is medically advisable for Sharon to live with someone to carry out the action that is required when Sharon has a hypoglycemia attack. The person that Sharon is living with in a lesbian relationship is aware of Sharon's condition and has administered glucagon to Sharon with orange juice. Jill was called by Sharon and testified that she and Sharon were lovers, that they share

household expenses, and that "gay" publications are present and open to view in their apartment. Jill further testified that she is not and would not be with Sharon 100 percent of the time.

Further, Sharon testified that her income is insufficient to maintain the present apartment and standard of living without Jill's contribution.

Notwithstanding, Sharon testified that she loved her son, wanted custody of her son, that she was physically, financially, and emotionally capable of assuming the responsibilities of custody.

Furthermore, where a person who is not a parent seeks custody under either the Probate Act or the Illinois Marriage and Dissolution Act, that person must sustain the burden set forth in *In Re Custody of Townsend* and the facts to be considered by the trial court were set forth in the case of *Montgomery v. Roudez*, 156

Ill.App.3d 262, First District (3rd Division), Opinion filed May 13, 1987, as follows:

....(1) the wishes of the child's parent as to his custody, (2) the sufficiency and stability of the respective parties' homes and surroundings (see In Re Estate of Becton (1985), 130 Ill.App.3d 763, 769, 474 N.E.2d 1318, 1324), (3) the interaction and interrelationship of the child to his parent and to any other person who may significantly affect the child's best interest, (4) the child's adjustment to his home, and (5) the mental and physical health of the individuals involved.

(Page 267)

The evidence also indicates that plaintiff has failed to demonstrate any continuous pattern of maturity or stability ... or an ability to deal independently with responsibility, personal finances, social problems, or parenting. (Page 268)

....sufficient maturation to act as a complete and full-time parent. (Page 268)

....a stable physical and emotional environment.... (Page 268)

Additionally, we find no error in the trial court's

consideration of the relative economic postures of the parties. While mere financial disparity is insufficient to deprive a natural parent of the custody of her child, the right of a parent to care for her child is associated with concomitant responsibilities.... Therefore, the economic positions of the parties are a factor that must be considered in determining the best interests of the child, especially where one party has no visible means of support.
(Page 268)

In the instant case, after taking into consideration the totality of evidence summarized above as well as the law set forth above, the Court holds that it is in the best interest of the minor, Laurence T. Brown, to grant the prayer of the Petition and place him in the custody of Gene and Glenda Brown. In addition, taking into consideration the income and expense information submitted by Sharon, it is the order of this Court that Sharon pay as and for partial child support \$10.00 per week commencing Friday,

January 6, 1989, and a like amount each and every week thereafter until further order of Court. In this regard the Court holds that Sharon's expenses are extraordinary but reasonable and that the statutory support guidelines should not be followed. All payments are to be made to the Circuit Clerk who is ordered and directed to forward the payments received to the Guardians, Gene and Glenda Brown.

In addition, Sharon M. Brown is granted reasonable visitation as defined by this Court October 7, 1987 except that Sharon is to have 2 weeks of visitation in June or such other 2-week period as the parties hereto agree. Further, the summer visitation is to be increased to 4 weeks when Larry attains the age of 7 years. When Sharon exercises visitation, an adult must be present with Sharon and Larry who can care for Sharon in the event she has a hypoglycemia attack,

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until such attacks are highly unlikely.

Copy of this Memorandum of Decision to
be mailed to the attorneys of record.

Written Order to be filed.

Dated this 30th day of November, 1988.

W. A. Sappington
Associate Circuit
Judge

Probate
Judge W. A. Sappington
November 30, 1988 (1km)

86-P-291 LAURENCE T. BROWN, Minor

In regard to "Petitioner's Motion to Strike Certain Portions of Respondent's Brief" filed herein July 8, 1988, cause removed from advisement as follows:

Paragraphs 1 and 2 were admitted by Respondent and, therefore are stricken;

Paragraph 3, denied;

Paragraph 4, granted;

Paragraph 5, granted.

In regard to Points I and II set forth in "Petitioner's Reply Argument and Brief" filed herein July 8, 1988, that "I. Respondent has waived her claim that Section 11-7 of the Probate Act is unconstitutional" in that she failed to comply with the requirements of Supreme Court Rule 19, the Court holds although the purported compliance with Supreme Court Rule was somewhat "cavalier",

Respondent did not waive her claim that Section 11-7 of the Probate Act is unconstitutional. Further, with respect to Petitioner's "II. Section 11-7 of the Probate Act is constitutional" in response to Respondent's Brief paragraph "1. Chapter 110 1/2, Paragraph 11-7, in that it permits the awarding of the custody and education of a minor to either parent or some other person solely in the situation where the parents live apart, is unconstitutional," this Court holds that Section 11-7 of the Probate Act is constitutional. See, by analogy, *Montgomery v. Roudez*, 156 Ill.App.3d 262, Para. 8 and 9, at Pages 268 and 269.

Copies of this entry to be mailed to counsel of record.

WARREN A. SAPPINGTON
Associate Circuit Judge
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Sherrie Randle
Secretary

Telephone
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November 30, 1988

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Dear Counsel:

A copy of the Memorandum of Decision
that I intend to sign and file Monday,
December 5, 1988 is enclosed for your
information. You and your associates and
staff, as well as your clients, are
ordered and directed NOT to disclose the
contents of this unsigned Memorandum of
Decision to anyone (other than the

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parties and lawyers of record) before
9:00 O'Clock a.m., Monday, December 5,
1988.

Very truly yours,

W. A. Sappington

WAS/sr

Enclosure

OCT 1 1991

No. 91-368

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

IN THE MATTER OF THE ESTATE OF LAURENCE T.
BROWN, a Minor.

SHARON M. BROWN,

Petitioner,
vs.

GENE BROWN and GLENDA BROWN,

Respondents.

**Petition For Writ Of Certiorari To The Appellate Court
Of The State Of Illinois, Fourth Judicial District**

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel of Record for Respondents

QUESTIONS PRESENTED

1. Is the Illinois statute under which petitioner's child was placed in the custody of respondents (petitioner's father and stepmother), *Ill. Rev. Stat.* (1985), Chapter 110^{1/2}, Para. 11-7, unconstitutional? Specifically:
 - A. Does the statute on its face violate due process or equal protection if it authorizes a court to award custody of a fit parent's child to non-parents based upon the child's best interests, but only in instances where both parents are alive and not living together?
 - B. Does the statute, as it was construed and applied by the Illinois Appellate Court, unconstitutionally deprive petitioner of a protected liberty interest in having the custody and care of her child in the absence of a finding of parental unfitness and a substantial State interest?
2. Did the Illinois Appellate Court improperly base its affirmance upon a certain reading of the statute in order to avoid adjudicating federal constitutional issues raised by petitioner, contrary to this court's decision in *NAACP v. Alabama*?

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In The
Supreme Court of the United States
October Term, 1991

IN THE MATTER OF THE ESTATE OF LAURENCE T.
BROWN, a Minor.

SHARON M. BROWN,

Petitioner,
vs.

GENE BROWN and GLENDA BROWN,
Respondents.

**Petition For Writ Of Certiorari To The Appellate Court
Of The State Of Illinois, Fourth Judicial District**

RESPONDENTS' BRIEF IN OPPOSITION

PRAYER

Respondents, Gene Brown and Glenda Brown, ask this Court to deny the Petition for Writ of Certiorari to review the judgment and order of the Appellate Court of Illinois, Fourth Judicial District, entered December 31, 1990, as petitioner does not raise any issue deserving of review.

STATEMENT OF THE CASE

A) Nature of Trial Court Proceedings

The key person in this case has been Laurence T. Brown, a minor ("Larry"). Petitioner is Larry's mother. Respondent Gene Brown is Larry's maternal grandfather and Respondent Glenda Brown is his maternal "step-grandmother".

On July 30, 1986, respondents filed for guardianship of Larry in the Circuit Court for Macon County, Illinois, pursuant to *Ill. Rev. Stat.* (1985), Ch. 110 $\frac{1}{2}$, Paras. 11-1 to 11-13. Petitioner was given notice as required by statute and counsel entered an appearance on her behalf. On May 27, 1987, the guardianship petition was amended to allege that even if petitioner was a fit parent, it would be in Larry's best interests to establish guardianship in respondents.

After the case was commenced, the parties engaged in pre-trial discovery. A number of pre-trial motions were filed and ruled on. On September 14, 1987, and on nine days at various times thereafter, the evidentiary hearing on the amended petition was conducted. In addition, on two other days depositions of two witnesses were taken and the transcripts were admitted into evidence in lieu of in-court testimony. A brief summary of the evidence is set forth below.

B) Summary Of The Evidence

Petitioner was 32 years old and lived in Chicago, Illinois. Since graduating from high school, she lived with roommates at eight different places and had 19 different

jobs. Six of her roommates were lesbians and petitioner was a practicing lesbian living in an open and on-going lesbian relationship with her present roommate. Petitioner was an admitted alcoholic and a cocaine addict, but said she was recovering from those conditions.

Larry was born February 20, 1986, as a result of a rape. The father's identity was known, but he had no contact with Larry. Efforts by the court appointed *guardian ad litem* to locate the father were unsuccessful. During her pregnancy, petitioner regularly used cocaine and alcohol, knowing this could be detrimental to the fetus.

On March 2, 1986, at petitioner's request and with her consent, respondents took Larry to Decatur, Illinois, to live with them. Petitioner then entered a drug treatment program in Chicago, from which she was discharged March 28, 1986. She then lived with respondents and Larry in Decatur until April 20, 1986, at which time she left by herself to return to Chicago. Upon leaving, she did not provide respondents with any information as to how she could be reached in Chicago. Petitioner did not have any further contact with her son until June 1, 1986, when she saw him with respondents at a family wedding in Indiana. After the wedding, petitioner had little contact with her son until September, 1986, when, pursuant to an agreement formulated by the parties through their attorneys, petitioner began alternate weekend visitation with Larry at respondents' home and later at petitioner's mother's apartment in Decatur. Petitioner contributed no money to the support of Larry during these times, even though she claimed she could have sent \$30.00 a week, because she was angry with her father.

On July 5, 1986, petitioner signed a notarized document in favor of respondents, granting them permission to care for Larry "as though he was their own". Thereafter, she wrote several letters to respondents in which she said that she couldn't afford to care for Larry and that she had been emotionally sick for a long time.

Since childhood, petitioner had been a "brittle diabetic", which had caused her to have numerous unpredicted insulin reactions. On a number of occasions since Larry's birth, petitioner had gone into diabetic comas. On one such occasion she was unconscious for five hours before being found by a policeman. The diabetes made it difficult for petitioner to awaken from her sleep. There were a number of instances at respondents' home when petitioner and Larry were sleeping in the same room and petitioner failed to wake up and attend to Larry when he would cry in the middle of the night.

Petitioner was employed at a graphics design firm in downtown Chicago. Her weekly take home pay was \$251.43 and her monthly expense and debt payments totalled \$1,282.00. Petitioner had no car and indicated that she and Larry would rely on public transportation if he came to live with her.

The apartment petitioner shared with her roommate had only one bedroom in use and petitioner and the roommate shared the bed. LaNell Hill, who performed a home study in connection with the case, was unaware of this and unaware that petitioner was a practicing lesbian. Nearly every night of the week, petitioner was involved in some type of substance abuse support group meeting.

Some of these meetings took place at petitioner's apartment on a regular basis. The other members of these support groups were also gay. Petitioner kept gay oriented literature and publications in open view in her apartment. Petitioner and her roommate kissed and held hands in public and did nothing to conceal the nature of their relationship. On several occasions while visiting with Larry at her mother's apartment, petitioner and her roommate slept together in the same room in which Larry was sleeping. Petitioner had sexual relations with her roommate on an on-going basis.

Respondents had been married eight years and had a good, loving relationship. Respondent Glenda Brown was 42, about to complete a M.S.W., and the executive director of a local senior citizens facility. Respondent Gene Brown was 61 and owned his own insurance agency. While married to petitioner's mother, respondent Gene Brown was unhappy about the marriage and did drink more at that time than at present. His present drinking pattern consisted of a couple of drinks in the evening at home.

Respondents' combined net monthly income was \$2,477.00, against total monthly expenses of \$2,004.00.

Respondents had integrated Larry into their household and took him with them nearly everywhere they went. At home, respondents would play with Larry, read to him, and engage in any number of other activities with him.

Dr. Radecki, a psychiatrist, had examined petitioner for about one hour in connection with the case. Prior to that he had never met petitioner. It was his opinion that petitioner would be able to provide a very good home for

Larry and would probably do a good to very good job of raising him. According to Dr. Radecki, social influences played a role in sexual orientation development and Larry was at the stage where he was forming his sexual identity. Dr. Radecki was unaware that petitioner had held 19 different jobs in 14 years, that she would frequently be rendered unconscious because of the diabetes, that she refused to support Larry out of the anger at her father, or that she returned to Chicago and remained *incommunicado* while Larry remained in Decatur with respondents. According to Dr. Radecki, lesbian relationships such as petitioner's were contrary to the sexual mores of present-day American society, although he felt that a large number of people would not find such relationships objectionable.

Dr. Campion, a licensed clinical psychologist, had observed Larry and respondents together on several occasions and had administered psychological tests to respondents. He had also read the transcript of petitioner's pre-trial deposition. According to him, respondents' psychological profiles were unremarkable and each of them had appropriate abilities to care for and raise Larry. Dr. Campion's opinion was that petitioner was an unfit parent. He articulated a number of concerns with a proposed award of custody to petitioner, including: whether petitioner's substance abuse had really been overcome; certain adverse effects Larry was likely to experience as a result of his mother's sexual orientation and lifestyle; the lack of any real stability on the part of petitioner; and, petitioner's diabetic comas. However, the primary concern for Dr. Campion was the strong bonding that had

developed between Larry and respondents. Dr. Campion's professional opinion was that a breaking of this bonding would be very traumatic and difficult for Larry.

C) Outcome Of The Litigation

Against this factual backdrop, the trial court granted the petition for guardianship. In the order granting the petition, the trial court found that under the applicable state statute, petitioner's fitness as a parent was not an issue and therefore no finding regarding fitness was made. The trial court specifically found that Larry's best interests would be served by establishing guardianship in respondents, with a grant of visitation rights to petitioner. In addition, the trial court found the statute to be not unconstitutional.

The Illinois Appellate Court affirmed the order of the trial court, holding that: (1) The statute was not unconstitutional; (2) Petitioner had waived any issue regarding respondents' lack of standing under state law to bring the action; (3) Even if there had been no waiver, respondents possessed standing; and, (4) The trial court's order was not against the manifest weight of the evidence. *In the Matter of the Estate of Laurence T. Brown*, 207 Ill. App. 3d 139, 565 N.E. 2d 312, 152 Ill. Dec. 70 (4th Dist. 1990). Petitioner's petition for rehearing was denied, as was her petition for leave to appeal to the Illinois Supreme Court.

REASONS FOR DENYING THE WRIT SUMMARY OF ARGUMENT

The issues raised by petitioner are not worthy of review by this Court. No special or important reasons exist for granting the writ. The judgment is not one of a state court of last resort, in spite of petitioner's unsupported assertion that for almost all Illinois litigants, the state intermediate court is the court of last resort. In any event, the decision of the Illinois Appellate Court in no way conflicts with the decision of another state court of last resort, of a United States Court of Appeals, or of this Court. The Illinois Appellate Court's decision may be supportable as a matter of state law not subject to this Court's review, even though issues of federal constitutional law were passed on.

The statute is not unconstitutional. On its face, the statute does not classify, let alone invalidly classify. A correct reading of the statute is that the "parents who live apart" referred to in the last sentence of the statute are the same "both parents of a minor who are living" and "fit parents" referred to in the last sentence of the statute. Furthermore, all Illinois decisional law, including that handed down by the Illinois Supreme Court, holds that under the statute in question, a parent need not be unfit or have forfeited custodial rights before guardianship or custody may be awarded to a non-parent. These same cases make no distinction between parents who are alive, dead, or living together or apart. In a successful non-parent action for custody there are only three requirements under state law: (1) The minor cannot be in the physical custody of a parent when the action is filed; (2)

good cause or compelling reasons must exist for not leaving custody with the parent; and, (3) The custody award to the non-parent must be in the child's best interest. Those three requirements satisfy the requirements of the Constitution of the United States. More might be required in a case of absolute termination of parental rights, but this is not such a case. Here, even though the trial court made no finding one way or another, petitioner was demonstrated to be unfit under state law and the evidence would have supported such a finding.

As construed and applied, the statute is not unconstitutional. The Illinois Appellate Court's construction is consistent with that of the Illinois Supreme Court. Petitioner received all of the process due her. She was afforded a full and fair evidentiary hearing. Substantively, she was not deprived of parental rights. Those rights remain intact, subject to guardianship rights vested in respondents. Even if a finding of unfitness were required to be made in the trial court, the evidence would have amply supported such finding. The State does have a substantial interest in this matter: To protect the emotional and psychological development of a child who has been voluntarily surrendered by the parent and to insure some continuity in that child's environment. The decision of the Illinois Appellate Court was not founded on petitioner's lesbianism, although the ongoing and open lesbian relationship was certainly a proper factor to consider. In fact, the opinion of the Illinois Appellate Court does not contain the words "lesbian" or "homosexual".

The Illinois Appellate Court's affirmation does not violate the principles set out in *NAACP v. Alabama*, 357

U.S. 49, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1964). The Illinois Appellate Court fully considered and disposed of petitioner's federal constitutional arguments. Even if a finding of unconstitutionality was avoided, this is in accord with the preferred method of judicial review and of statutory construction. Errors of a state court in interpreting and applying state law furnish no basis for a claim of denial of due process. Moreover, this Court is bound to accept a state court's construction and interpretation of its own laws, such as the state guardianship law in issue here.

ARGUMENT

1.A. ON ITS FACE, THE STATUTE DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION.

Preliminarily, respondents emphasize that the judgment of which review is sought is not one of Illinois' court of last resort. Even if it were, it does not conflict with the decision of another state court of last resort, the United States Court of Appeals, or this Court. The Illinois Appellate Court's decision is solely a matter of state law, construing and applying *Ill. Rev. Stat.* (1985), Ch. 110^{1/2}, Para. 11-7. Even though the Illinois Appellate Court did pass on issues of federal constitutional law, its decision is supportable as a matter of state law not subject to this Court's review. *See, Maryland v. Baltimore Radio Show*, 338 U.S. 912, 70 S.Ct. 252, 94 L.Ed 562 (1950).

Petitioner advances a convoluted and strained reading of the statute in order to claim invalid classification. The statute talks about parents. In the first sentence, it

refers to "both parents of a minor who are living" and in the last sentence, it refers to "parents who live apart". According to petitioner, parents of the type referred to in the first sentence cannot experience custody being granted to a non-parent so long as the parents are "fit parents". However, since the "parents who live apart" referred to in the last sentence of the statute must, of necessity, be "both parents of a minor who are living", then they are a mere subclass of the group of living parents and are treated identically under the statute.

Moreover, petitioner's interpretation of the statute has not, as a matter of state law, been adopted by the Illinois courts. The cases of *People ex rel v. Livingston*, 42 Ill. 2d 201, 247 N.E. 2d 417 (Ill. 1969); *In Re Custody of Townsend*, 86 Ill. 2d 502, 427 N.E. 2d 1231, 56 Ill. Dec. 685 (Ill. 1981); and, *In Re Estate of Wittington*, 107 Ill. 2d 169, 483 N.E. 2d 210, 90 Ill. Dec. 892 (Ill. 1985) are all Illinois Supreme Court decisions under this particular statute containing explicit holdings that a parent need not be unfit or have forfeited custodial rights before custody may be awarded to a non-parent, if the best interests of the child would be served. No distinction is drawn between parents who are living together, living apart, dead, or alive. In fact, *Townsend* involved a set of parents who were both alive, but living apart, exactly as in this case. The Illinois Appellate Court has even applied the best interest standard in a case under the statute where a non-parent was claiming custody as against a set of parents living together. See, *Mosely v. Goldstone*, 89 Ill. App. 3d 360, 411 N.E. 2d 1145, 44 Ill. Dec. 779 (1st Dist. 1980).

The decisional law of the State of Illinois, as set forth above, does create a presumption that the natural parent

has a right to custody superior to the claim of a non-parent (the "superior rights doctrine"), but the presumption is not absolute and serves as only one factor in resolving the controlling question of the best interests of the child. *Townsend*, 427 N.E. 2d at 1231.

Even assuming for the sake of argument that the statute does make the classification claimed by petitioner, she is not aggrieved by its operation. Petitioner's invalid classification argument is premised upon the notion that the statute does not expressly require a finding of unfitness in a case of a parent living apart from the other parent. As more fully argued elsewhere, the evidence would fully support a finding of unfitness under state law. Respondents feel it is important to point out that the trial court did not specifically refuse to find petitioner unfit, but merely remarked in its order that her fitness was not an issue. It is plain that the trial court did not feel compelled to find on her fitness given the present state of Illinois decisional law. If petitioner was unfit, which both respondents and the Illinois Appellate Court think, then petitioner has sustained no constitutional or other damage by the failure of the trial court to make an express finding of unfitness.

There is an additional state statute which authorizes non-parent custody awards and under which respondents could have proceeded, *Ill. Rev. Stat.* (1985), Ch. 40, Para. 601(b)(2). That provision provides for commencement of a custody action by a non-parent, but only if the child is not in the physical custody of one of the parents. The Illinois Appellate Court has specifically found this provision, which is a part of the Illinois Marriage and Dissolution of Marriage Act, to satisfy the requirements of due

process and equal protection. *Montgomery v. Roduez*, 156 Ill. App. 3d 262, 509 N.E. 2d 499, 108 Ill. Dec. 803 (1st Dist. 1987). Under this alternate provision, and under *Montgomery*, so long as there is limited standing on the part of the non-parent, based upon the child not being in the physical custody of a parent, an award of custody to the non-parent on the basis of the best interests of the child is permitted regardless of the fitness of the parent. Since respondents could have proceeded under this state law, it is respondents who will be denied equal protection if the decision of the Illinois Appellate Court is disturbed. It was a fortuitous circumstance that respondents chose to proceed under the one state law, which is here under attack due to the inclusion therein of language concerning parents who are alive and parents who are living apart, as opposed to the alternate provision found in the state divorce laws and not containing the complained of language.

1.B. AS CONSTRUED AND APPLIED BY THE ILLINOIS APPELLATE COURT, THE STATUTE DOES NOT UNCONSTITUTIONALLY DEPRIVE PETITIONER OF A PROTECTED LIBERTY INTEREST IN HAVING THE CUSTODY AND CARE OF HER CHILD.

Respondents agree that family matters are entitled to substantial constitutional protection. However, the cases relied upon by petitioner are not applicable to this case. For example, *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972) involved an absolute and permanent termination of parental rights. In this case, petitioner's parental rights were not terminated, as petitioner has a right to visit and a duty of support. Furthermore,

the Illinois Appellate Court found a specific right on the part of petitioner to in the future seek expanded visitation and a return of custody. *Brown*, 565 N.E. 2d at 316.

This Court has previously upheld a state statute permitting parental rights to be permanently terminated on a best interest, as opposed to an unfitness, standard. *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed. 2d 511 (1978).

The Illinois Appellate Court in *Montgomery v. Roduez*, 156 Ill. App. 3d 262, 509 N.E. 2d 499, 108 Ill. Dec. 803 (1st Dist. 1987) has previously rejected the type of constitutional arguments petitioner now makes. There, the mother argued due process required a finding of unfitness before she could lose custody. The Illinois Appellate Court disagreed, stating that the mother was neither exposed to, nor did she suffer, total deprivation of her parental rights and that she received a full and fair hearing to determine what custodial arrangement would be in the child's best interest. *Montgomery*, 108 Ill. Dec. at 808. The "superior rights doctrine" and the presumption in a parent's favor arising out of that doctrine adequately protect petitioner's liberty interest. See, *Townsend*, 427 N.E. 2d at 1235.

In *Montgomery*, the Illinois Appellate Court also addressed the interest of the state in awarding custody of a minor to a non-parent in the absence of a finding of parental unfitness. The Illinois Appellate Court focused on the requirement under Illinois state law that a non-parent custody action may only be commenced when a child is not in a parent's physical custody and remarked that the decision to surrender a child to a non-parent

impacted emotionally and psychologically on the child; therefore, when a parent attempts to regain custody, the State has an obligation to protect the emotional development of the child and ensure continuity in the child's environment. *Montgomery*, 108 Ill. Dec. at 808-9. The Illinois Appellate Court, in *Mosely v. Goldstone*, 89 Ill. App. 3d 360, 411 N.E. 2d 1145, 44 Ill. Dec. 779 (1st Dist. 1980), held that the constitutionally protected parental right to custody must give way upon a showing that custody by the parent is seriously challenged as being detrimental to the welfare of the child. *Mosely*, 411 N.E. 2d, at 1151-2. These state court decisions are in accord with the decisions of this court. In *Kovacs v. Brewer*, 356 U.S. 604, 78 S.Ct. 963, 2 L.Ed. 2d 1008, 1014 (1958), this Court recognized that when the care and protection of minors within their borders falls to the States, the States must be free to do what is in the best interest of the child. More recently, in *Palmore v. Sadoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed. 2d 421 (1984) this Court remarked that a state has a duty of the highest order to protect the interest of minor children and that the goal of granting custody based on best interests is indisputably a substantial governmental interest for equal protection purposes. Also, in *Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 844-5, 97 S.Ct. 2094, 54 L.Ed 2d 14 (1977) this Court acknowledged the importance of intimacy of daily associations and rejected characterization of a foster family as a "mere collection of unrelated individuals". There is a substantial state interest in preserving the integrity of the family unit which has been formed by respondents and Larry. The employment of the best interest of the

child standard is rationally related to the achievement of that end.

Even if the Constitution of the United States requires a finding of unfitness, there was ample evidence of it in this case. As a matter of state law, a parent is unfit if, among other things, he or she: is guilty of open and notorious adultery or fornication [Ill. Rev. Stat. (1985), Ch. 40, Para. 1(D)(j)]; is addicted to non-prescribed drugs for at least one year prior to the unfitness proceeding [Ill. Rev. Stat. (1985), Ch. 40, Para. 1(D)(k)]; fails to demonstrate a reasonable degree of interest, concern, or responsibility as to the welfare of a newborn child during the first 30 days after birth [Ill. Rev. Stat. (1985), Ch. 40, Para. 1(D)(m)]; fails to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare [Ill. Rev. Stat. (1985); Ch. 40, Para. 1(D)(b)]; or, abandons the child [Ill. Rev. Stat. (1985), Ch. 40, Para. 1(D)(a)]. The Illinois Appellate Court in this case noted petitioner's near abandonment of the child and her substance abuse, especially while pregnant with Larry and with full knowledge of its possible detrimental effect upon him. *Brown*, 565 N.E. 2d at 316-17.

Petitioner attempts to convince this Court that the result in this case was a product of lesbian prejudice. First, the words "lesbian" or "homosexual" were not once mentioned in the Illinois Appellate Court decision. Second, under state law, sexual orientation is one factor to be considered in a custody determination. *In Re Marriage of Williams*, 205 Ill. App. 3d 613, 563 N.E. 2d 1195, 151 Ill. Dec. 89 (3d Dist. 1990). This Court, in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed. 2d 140 (1986) recognized that proscriptions against consensual sex between

persons of the same gender have ancient roots and that the law is constantly based upon notions of morality. *Bowers*, 92 L.Ed. 2d at 146-49. In his concurrence, former Chief Justice Burger wrote, "(C)ondemnation of (homosexual) practices is firmly rooted in Judeao-Christian moral and ethical standards". *Bowers*, 92 L.Ed. 2d at 149 (concurring opinion).

2. THE ILLINOIS APPELLATE COURT'S AFFIRMANCE WAS NOT IMPROPERLY BASED UPON A CERTAIN READING OF THE STATUTE IN ORDER TO AVOID ADJUDICATING FEDERAL CONSTITUTIONAL ISSUES.

This Court's decision in *NAACP v. Alabama*, 357 U.S. 49, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1964) does not stand for the proposition claimed by petitioner. In fact, that case actually stands for the proposition that even the United States Supreme Court will avoid decision of constitutional issues by deciding a case on non-constitutional grounds. Admittedly, in that case, this Court articulated its duty to ascertain whether the asserted non-federal grounds independently and adequately support the judgment. *NAACP v. Alabama*, 357 U.S. at 455. Unlike the state court in *NAACP v. Alabama*, the Illinois Appellate Court here did address and dispose of petitioner's federal constitutional arguments, albeit in a manner unfavorable to petitioner. Specifically, petitioner complains of the Illinois Appellate Court's statement that a rebuttal of the presumption that a parent has a superior right to custody is the legal equivalent of a demonstration that a parent is not "fit" and under the statute as so construed, *all* parents must be shown to be not fit.

Petitioner overlooks several important decisions of this Court in making this complaint. In *Howard v. Kentucky*, 200 U.S. 164, 172-3, 26 S.Ct. 189, 50 L.Ed. 421 (1906) this Court held that errors of the state court in interpreting and applying state law furnish no basis for a denial of due process claim. In the same case, this Court announced that it was bound to accept the state court's interpretation and application of the state law as a correct exposition of the law of the state - common, statutory, and constitutional. *Howard*, 200 U.S. at 173. This Court has also held that a decision by a state court amounting merely to erroneous construction of a state statute is not a denial of due process so as to be reviewable. *Neblett v. Carpenter*, 305 U.S. 297, 302, 59 S.Ct. 170, 83 L.Ed. 182 (1938).

This is not to say that the Illinois Appellate Court erroneously interpreted or applied the statute. In *Ullman v. United States*, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511, reh den 351 U.S. 928, 76 S.Ct. 777, 100 L.Ed. 1457 (1956), this Court indicated that when the validity of a statute is drawn in question, and even if there are serious doubts as to constitutionality, the proper function of the Court is to ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided. If the Illinois Appellate Court is guilty of anything, it is following the long-standing guidelines of this Court for adjudication of constitutional questions.

CONCLUSION

WHEREFORE, Respondents, Gene Brown and Glenda Brown, ask this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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